Petition

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In the Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Respondent,

vs.

ONE 1945 DOUGLAS C-54 (DC-4) AIRCRAFT,
SERIAL NUMBER 22186,
J. MICHAEL STUMPFF,
Petitioner-Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in an action for forfeiture under 21 U.S.C. Section 881(a)(4), the trial court's refusal to apply Missouri law in determining the ownership interest of Petitioner-Intervenor, constituted an abuse of discretion or denial of due process.

2. Whether in a forfeiture action, under 21 U.S.C. Section 881(a)(4), the trial court's ordering of forfeiture of a vehicle which has never been used in any way to facilitate the transportation or sale of illegal substances, is unconstitutional and in violation of the Fourth, Fifth, and Eighth Amendments to the United States Constitution, or misconstrues the statutes.

TABLE OF CONTENTS

Questions Presented for Review I

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ:

1. In an action for forfeiture under 21 U.S.C. Section 881(a)(4), the trial court's refusal to apply Missouri law in determining the ownership interest of Petitioner-Intervenor, constituted an abuse of discretion or denial of due process 5
2. In a forfeiture action, under 21 U.S.C. Section 881(a)(4), the trial court's ordering of a forfeiture of a vehicle which has never been used in any way to facilitate the transportation or sale of illegal substances, is unconstitutional and in violation of the Fourth, Fifth, and Eighth Amendments to the United States Constitution or misconstrues the statutes 8

Conclusion 20

Appendix:

Opinion of the United States District Court, filed December 11, 1978 ..... A1

Opinion of the United States Court of Appeals, filed August 17, 1979 ..... A7

Opinion of the United States District Court, filed April 18, 1980 ..... A13

Opinion of the United States Court of Appeals, filed May 11, 1981 ..... A17

Order of the United States Court of Appeals for the Eighth Circuit A23

Table of Authorities

CASES

Bramble v. Richardson, 493 F.2d 968 (10th Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974) 10

Bunting v. McDonnell Aircraft Corp., 522 SW2d 161 (Mo. 1975) 7

Colero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), *rehearing denied*, 417 U.S. 977 (1974) 9, 10, 11, 12, 14, 17, 18

Corfield v. Coryell, 6 F. Cas. 551 (C.C.E.C. Pa. 1823) 11

General Finance Corporation of Florida South v. United States, 333 F.2d 681 (5th Cir. 1964) 5

Glass v. Allied Van Lines, Inc., 450 SW2d 217 (Mo. App. 1970) 5

Powell v. Texas, 392 U.S. 514 (1968) 11

R. L. Sweet Lumber Company v. E. L. Lane, Inc., 513 SW2d 365 (Mo. 1974) 6

Robinson v. California, 370 U.S. 660 (1962) 11

Savannah Bank & Trust Company v. Great American Indemnity Company, 303 F.2d 247 (1st Cir. 1962) 5

Snead v. United States, 217 F.2d 912 (4th Cir. 1954) 15

United States v. Bryan, 265 F.2d 693 (5th Cir. 1959) 16

United States v. One Ford Truck, 46 F.2d 176 (5th Cir. 1931) 14

United States v. One 1970 Buick Riviera, 374 F. Supp. 277 (D. Minn. 1973) 16, 17

United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977) 13

United States v. One 1972 Datsun, 373 F. Supp. 1200 (D. N.H. 1974) 13, 14

United States v. Kramel, 234 F.2d 577 (8th Cir. 1956) 5

United States v. One 1971 Lincoln Continental, 460 F.2d 273 (8th Cir. 1972) 5
United States v. One 1971 Porsche Coupe, 364 F. Supp. 745 (E.D. Pa. 1973) 6
United States v. $1,963 in U.S. Money, 270 F. Supp. 396 (E.D. Tenn. 1967) 8
United States v. 600 Bags of Southcoast Turbinado Brand Sugar, 225 F. Supp. 705 (W.D. La. 1961) 16
United States v. Rich, 518 F.2d 930 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976) 19
United States v. U.S. Coin and Currency, 401 U.S. 715 (1971) 9, 14
Yellow Mfg. Acceptance Corp. v. United States, 84 F.2d 164 (9th Cir. 1936) 15

STATUTES

21 U.S.C. Sec. 801 (1976) 19
21 U.S.C. Sec. 881 (1976) 1, 3, 8, 9, 12, 13, 17

OTHER AUTHORITIES

O. Holmes, THE COMMON LAW (1881) 11
W. LaFave and A. Scott, CRIMINAL LAW 179 (1972) 10
U.S. Code, Cong. & Ad. News, 4653-54 (1970) 19
C.J.S., *"Conflict of Laws"*, Sec. 18, p. 494 5
C.J.S., *"Property"*, Section 13, p. 192 7
C.J.S., *"Property"*, Sec. 17, p. 211 5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

This is a case involving forfeiture of a vehicle under 21 U.S.C. Section 881(a)(4). The United States District Court for the Western District of Missouri entered its Order December 11, 1978, forfeiting the vehicle. The United States Court of Appeals for the Eighth Circuit entered its Order August 17, 1979, remanded to the District Court for a determination of the Petitioner-Intervenor's interest.

On April 18, 1980, the United States District Court for the Western District of Missouri, entered its Order dis-

missing Petitioner-Intervenor's intervention, and on May 11, 1981, the United States Court of Appeals for the 8th Circuit affirmed that dismissal.

Application for re-hearing en banc was denied on June 8, 1981. Copies of the opinions of both the Circuit Court and District Court, as well as the Order denying the re-hearing are attached within the appendix.

STATEMENT OF JURISDICTION

Petitioner's appeal was denied by the United States Court of Appeals to the Eighth Circuit on May 11, 1981, and re-hearing was denied on June 8, 1981.

The United States Supreme Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

United States Code

§ 881. Forfeitures—Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), . . .

STATEMENT OF THE CASE

This action is a forfeiture proceeding involving a 1945 Douglas C-54 (DC-4) Aircraft. That plane was seized on January 8, 1978 by DEA Agents, and J. Michael Stumpff, the Petitioner-Intervenor, was notified as owner of record. A Complaint of Forfeiture was filed on January 20, 1978, and Appellant filed an Answer and Claim (later treated as a Motion to Intervene).

There is no issue of actual registered ownership.

There is no issue of actual use to transport prohibited substances. The Government has admitted that it had no evidence of any such use.

The deposition of Albert Kammerer was taken May 25, 1978. There Mr. Kammerer stated that he put up the money for the plane (p. 22) and that he personally

intended to use the plane to transport illicit drugs if he got the chance. (p. 10) At Kammerer's request, Stumpff later executed a blank assignment (p. 24), which subsequently was admitted to be to a bondsman as security for Kammerer's bond.

Holding that it was unnecessary to determine who owned this plane the Trial Court granted the Forfeiture on December 11, 1978, from which Order Appellant took this appeal.

The Court of Appeals remanded for determination of Stumpff's interest.

Petitioner-Intervenor then submitted additional evidence of ownership, including evidence of his possession and control of the vehicle, as well as his personal expenditure of over $4,500.00 for parts for the aircraft (which did not arrive until after seizure and were, therefore, not delivered although paid for).

Nonetheless, the trial court held that Petitioner-Intervenor lacked standing and dismissed the intervention.

REASONS FOR GRANTING THE WRIT

This case presents important issues limiting the discretion of District Court's in applying forfeiture statutes.

The first issue raises the question as to whether a District Court may dismiss the intervention of a party who clearly has an ownership interest in the property under the laws of the State of Missouri, in which such property was located at the time of the forfeiture.

The second question raised is whether any such forfeiture can be held when the District Court has no evidence of any use of the property - or intended use by the Petitioner-Intervenor, for forbidden purposes.

1. In an Action for Forfeiture Under 21 U.S.C. Section 881(a)(4), the Trial Court's Refusal to Apply Missouri Law in Determining the Ownership Interest of Petitioner-Intervenor, Constituted an Abuse of Discretion or Denial of Due Process.

The owner (or owners) of a res have standing to challenge a forfeiture. *United States v. One 1971 Lincoln Continental*, 460 F.2d 273, 274 (8th Cir. 1972); *General Finance Corporation of Florida South v. United States*, 333 F.2d 681 (5th Cir. 1964). Such "ownership" must be determined by the law of the state and federal courts must apply the law of the state wherein a res is located in determining ownership. *United States v. Kramel*, 234 F.2d 577, 580 (8th Cir. 1956); *Savannah Bank & Trust Company v. Great American Indemnity Company*, 303 F.2d 247 (1st Cir. 1962); C.J.S., "*Conflict of Laws*", Sec. 18, p. 494.

There is no dispute that Petitioner-Intervenor has title to the plane. Nor is there any real question of possession, dominion or control. Petitioner placed the aircraft at one airport, paid the storage, rented equipment to repair the aircraft, moved it to an airport that was better equipped, paid for storage and repair and obligated himself to pay for additional storage and repair on the aircraft (the last storage and repair was ultimately paid for - by stipulation of parties - from the proceeds of the sale of this aircraft. He made additional personal expenditure of $4,500.00 for parts from G & H Air Parts, Incorporated. It is clear that Intervenor had possession (through his bailee, Airman, Inc. the aviation equivalent to a service station or parking lot), and it is equally clear that such possession (independent of his legal title) creates a presumption of ownership under Missouri law. *Kramel*, supra; *Glass v. Allied Van Lines, Inc.*, 450 SW2d 217 (Mo. App. 1970); C.J.S., "*Property*", Sec. 17, p. 211.

Of course, such a presumption may be rebutted, but it must be rebutted with evidence of facts *inconsistent* with ownership. That was the case in *United States v. One 1971 Porsche Coupe,* 364 F. Supp. 745 (E.D. Pa. 1973), where a gift of an automobile had been made by a father to a son, who thereafter (and when seized) had "sole possession and exercised dominion and control over it", although the father had kept the title in his name.

There is no such evidence inconsistent with ownership in this case. The Court points to the fact that Kammerer put up the original purchase money, giving it to Intervenor. Later, Intervenor allowed Kammerer to use the plane as collateral to obtain bond. Neither incident is inconsistent with Intervenor's ownership.

In the event that the money was a gift, then no interest would attach, legal or equitable. If the money were a loan, then any interest held by Kammerer as a result of giving Stumpff the purchase money, is at best, an equitable purchase money lien. That is a mere right to be repaid. Neither that "equitable lien" (if it exists) nor the right of the bondsman (which have terminated by Kammerer's surrender) amount to an ownership interest. *R. L. Sweet Lumber Company v. E. L. Lane, Inc.,* 513 SW2d 365 (Mo. 1974).

It should be noted by the Court that the taking of open titles on vehicles, deeds of trust, on land and even checks to be held for collateral, is not an uncommon practice among bondsmen in this circuit. However, the act of Intervenor placing the plane as collateral for Kammerer's bond, was in and of itself, an act of dominion and control, which could be done by none other than the owner.

Finally, the Intervenor meets the ultimate test of ownership. No one else could successfully sue him for possession of the vehicle. That is the test set out in *Bunting v. McDonnell Aircraft Corp.*, 522 SW2d 161, 167 (Mo. 1975) and summarized in C.J.S., "*Property*", Sec. 13, p. 192:

> "The essence of ownership of a thing is that aid which organized society will, through the courts as its agent, give one individual to the exclusion of all others, to take or keep possession of it."

No one could successfully dispossess Intervenor of this aircraft under the evidence considered by the Trial Court. There is no question that if this Court were reviewing a Trial Court decision, awarding possession of this aircraft to Kammerer, the Court would reverse. Yet, this is precisely the issue presented. To hold that Stumpff is not the owner, it is necessary to rule that Kammerer is, and the evidence is plainly insufficient to make such a finding. For that reason Judge Oliver's ruling was clearly against the weight of the evidence.

Of course, this Court may choose to ignore the law and affirm the dismissal. That has been an unfortunate tendency in the cases where the whiff of marijuana is in the air, it is a tendency to poison our entire justice system, making bad law under which we must all live.

But the law is clear: even if Intervenor had used his plane to transport dope (which he clearly had not) it was nonetheless *his* plane. He is entitled to intervene.

2. In a Forfeiture Action, Under 21 U.S.C. Section 881(a)(4), the Trial Court's Ordering of a Forfeiture of a Vehicle Which Has Never Been Used in Any Way to Facilitate the Transportation or Sale of Illegal Substances, Is Unconstitutional and in Violation of the Fourth, Fifth, and Eighth Amendments to the United States Constitution or Misconstrues the Statutes.

The Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 881 (1976)) states in relevant part as follows:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: ...
>
> (4) All conveyances, including aircraft . . . which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property [controlled by § 881]....

It is on the basis of this statutory language that the government proposes to condemn the *res* in this case. The government has admitted that it has no evidence whatsoever that the conveyance was ever used in violation of § 881. Thus, the government and the Trial Court construe § 881 (a) (4) as follows:

> (4) All conveyances, including aircraft . . . *which are . . . intended for use* . . . to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property [controlled by § 881] . . . [are subject to forfeiture]. (Emphasis added).

So construing the statute, the Complainant seeks to establish his burden of proof by showing only that someone

intended to use the airplane in violation of § 881, and the Court took that burden of proof to be discharged by the government's showing that either the Intervenor or Albert Kammerer intended to use the vehicle in violation of § 881. This case is unique to § 881, and possible American jurisprudence, for in no other reported case has the government sought to forfeit a vehicle solely because of what someone subjectively thought about doing with it.

A. Constitutionality.

The Supreme Court of the United States has indicated that forfeiture statutes such as this one may give rise to "serious constitutional questions." *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 685 (1974), *rehearing denied*, 417 U.S. 977 (1974). The Court's construction of the statute below is such a constitutional problem, for its action amounts to the imposition of a criminal penalty without an *actus reus*, i.e., it amounts to the application of a punitive sanction without anyone or anything having performed an action. But the Fifth and Eighth Amendments to the United States Constitution make the performance of an action a condition precedent upon the applicability of the criminal and quasi-criminal law.

Forfeitures have a special status in the law. They are not favored, but they are an ancient and respected tool of law enforcement. They are civil for the purposes of some classifications (e.g., there is no right to a jury trial and Complainant's burden of proof is only by a preponderance of the evidence), but they have criminal status for other classifications. For example, the Supreme Court has observed that it makes little difference whether a man pays a forfeiture or a criminal fine, *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971), and the Court has also indicated that forfeitures are to be placed,

in part, in the "punitive . . . jurisprudence" of this country. *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 685, *rehearing denied*, 417 U.S. 977 (1974), quoting *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921). Furthermore, some intermediate-level appellate courts have observed that forfeitures are to be considered at least quasi-criminal for the purposes of the Fourth and Fifth Amendments. *Bramble v. Richardson*, 498 F.2d 968 (10th Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).

Forfeiture statutes have another special characteristic—they are proceedings in rem in which the thing to be condemned is attributed a personality and treated as if it were a defendant accused of having violated the law. *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681f. (1974), *rehearing denied*, 417 U.S. 977 (1974). Forfeitures may be conceptualized as criminal proceedings against the *res*, where the burden of proof is by the preponderance of the evidence. (See *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681-82 (1974), *rehearing denied*, 417 U.S. 977 (1974) for a discussion of the historical background forfeitures.)

If forfeitures are at least quasi-criminal then the common law makes the *performance of an action* as an absolute precondition to forfeiture (see W. LaFave and A. Scott, CRIMINAL LAW 179 (1972)). There can be no doubt that an *actus reus* is a fundamental tenet of the criminal part of the common law. The *actus reus* requirement could be met in either of two ways: first, some person might do something in conjunction with the vehicle which would amount to the *actus reus* authorizing forfeiture, and second, the thing itself considered as having personality might do something, that is, it might undergo motion in the service of unlawful activity. Evidently,

O. W. Holmes, whose work on forfeiture is cited in *Colero-Toledo* (at 695) and frequently elsewhere, conceptualized forfeitures this way. (See O. Holmes, THE COMMON LAW (1881).) The key facts about the instant case in this context are first that the Complainant's evidence does not show that any person ever engaged in unlawful conduct in conjunction with this *res*, and second that this evidence does not show that the *res* itself ever moved in the service of any law breakage.

Historically, it seems clear that the Fifth Amendment was designed to protect the fundamental rights of the common law. See *Corfield v. Coryell*, 6 F. Cas. 551-52 (C.C.E.C. Pa. 1823). Today, there can be no doubt that fundamental common law rights are at the core of, though by no means exhaustive of, constitutional protections of due process. Moreover, the *actus reus* precondition on criminal and quasi-criminal sanctions is also inherent in the Eighth Amendment. As the Supreme Court of the United States has stated:

> The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause [*Robinson v. California*, 370 U.S. 660 (1962)] is that criminal penalties may be inflicted only if the accused has *committed some act, has engaged in some behavior*, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. *Powell v. Texas*, 392 U.S. 514 (1968). (Emphasis added).

In a forfeiture action, the "accused" is the *res*, and either it or someone alse (like its owner or someone in lawful possession of the *res*) must "commit some act" or "engage in some behavior"; otherwise, a criminal or quasi-criminal (and certainly at least punitive) sanction will be applied

to the *res*, which is considered as if it were a person, and to the owner of the *res*, an actual person, all without an *actus reus* and therefore in violation of the Eighth Amendment.

B. Statutory Construction.

These constitutional infirmities cannot be avoided if the statute is construed as the Trial Court below and the government has construed it. But the statute may be otherwise interpreted. In fact, among the reported cases on forfeiture appellant has not been able to locate a single case in which a forfeiture was effected under § 881 solely because someone intended to use the vehicle in an unlawful way. Nor have we located a reported case in which the government even attempted to secure a forfeiture under § 881 upon such grounds. Indeed, the language of the Supreme Court of the United States, consistently presupposes that some activity is required for the statute to be applicable. In *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), *rehearing denied*, 417 U.S. 977 (1974) the Court is expounding a Puerto Rican statute virtually identical with § 881(a). The Court describes the statute as "fostering the public interest in preventing *continued illicit use* of the property and in enforcing criminal sanctions." (At 681-82 (emphasis added).) The word "continued" clearly indicates that the Court does not take the statute to be applicable until there has been a least one unlawful use. Moreover, other language of the Court in *Colero-Toledo* reinforces this point:

> Forfeiture of conveyances that *have been used—and may be used again*—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing *further illicit* use of the conveyance and by imposing economic penalties. (*Id.* at 685).

Again, the Court's language indicates that it takes the legislative purpose behind forfeiture statutes such as § 881 to presuppose at least one prior illegal use of the vehicle.

Similarly other courts have indicated that the application of § 881 presupposes some criminal use of the vehicle. The Court of Appeals for the Second Circuit has indicated that forfeiture statutes are to be interpreted broadly enough to allow the forfeiture of a car which transports someone to the site of a narcotics sale. But at the same time, it has held that a vehicle is forfeitable only if it fits under the "in any way facilitates" clause of § 881. *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977). From the fact that someone intends to use a *res* to violate the law, it does not follow that the *res* has thereby in some way facilitated the breaking of the law. Facilitation requires action and not mere intention. Thus, although the concept of facilitation is to be viewed broadly, so that a variety of actions count as facilitation, that concept cannot be understood as including the subjective mental states of possible users of the vehicle. (For a narrower understanding of the concept of facilitation see *United States v. One 1972 Datsun*, 378 F. Supp. 1200 (D. N.H. 1974).)

The broad sweep of federal cases in the forfeiture area has been summarized by the judge in the *Datsun* case as follows:

> [T]o be forfeited, a vehicle must have some substantial connection to, or be instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent. (*Id.* at 1204).

This formula has never been *per se* disputed in a reported case, including *Cadillac Eldorado*, which took issue with the way in which *Datsun* applied the formula. Clearly, this formula interprets § 881 to require an *actus reus*

as a precondition for forfeiture. But the trial court below held that the *Datsun* formula was *per se* mistaken for it held that mere intention to use was sufficient for forfeiture. The *Datsun* formula receives some support from *United States v. United States Coin and Currency,* 401 U.S. 715 (1971) in which the Court held that significant involvement in criminal enterprise is required as a precondition for forfeiture. Of course this holding does not mean that the government may not forfeit the property of innocent owners whose vehicles are used for illegal purposes (see *Colero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), *rehearing denied,* 417 U.S. 977 (1974)). But it does mean that the *res* itself must be involved in criminal enterprise. And the trial court below so holds. But it also holds that if someone intends to use a vehicle for a prohibited purpose, then that vehicle is significantly involved in a criminal enterprise. This view is surely mistaken, however, for "involvement in criminal enterprise" requires more than an object's being intended for use in that enterprise.

In its suggestions supporting its motion for a judgment on the pleadings, the government argued that the "statutory phrase 'intended for use' has a lengthy history in being applied in many remedial statutes." (p. 3). The government's argument suffers from two difficulties. First, it fails to recognize that forfeiture under statutes like § 881 is only partly remedial, and it fails to give weight to the fact that they are also partly punitive. Second, the five cases it cites to support its view are inapposite.

(a) In *United States v. One Ford Truck,* 46 F.2d 176 (5th Cir. 1931), the court affirmed the forfeiture of sugar found on a truck which was backed up to a house containing a still. The court held that the vehicle is forfeitable not only if it contains taxable (i.e., illegal) sub-

stances but also materials for the manufacture of illegal substances. This case would be similar to the instant case only if the agents had seized the truck on the grounds that someone was going to go and pick up some sugar and if the court had held the vehicle forfeit on the grounds that the someone intended to carry sugar.

(b) In *Yellow Mfg. Acceptance Corp. v. United States*, 84 F.2d 164 (9th Cir. 1936) agents had seized a truck containing a large amount of molasses obviously heading toward an illegal still. When the agents closed in, the driver fled. The court held that the truck was forfeited because the material was intended for use in the manufacture of taxable (i.e., illegal) materials. The important thing to notice about this truck is that it was already involved, by means of its motion, in an illegal scheme, i.e., the manufacture of moonshine. *Yellow Mfg.* would be similar to the present case only if the government had seized it before it had ever become involved in the scheme.

(c) In *Snead v. United States*, 217 F.2d 912 (4th Cir. 1954) the government seized a truck containing 4,000 lbs. of compressed yeast and 14,000 lbs. of malt parked among abandoned cars behind the claimant's service station. Federal agents had followed the truck on a journey from Wisconsin to Virginia. The yeast had been purchased in Wisconsin, the license plates had been changed in Illinois, the malt had been purchased in Ohio, and the truck then driven to Virginia. Given the totality of facts and circumstances, it is clear that a criminal conspiracy to manufacture alcohol had begun and the truck had been used in that conspiracy. This is simply not a case where the mere intention to use without any use at all justifies seizure.

(d) In *United States v. Bryan*, 265 F.2d 698 (5th Cir. 1959), the government seized pipes and plumbing supplies. A long trial showed that claimant was involved in running a bootleg supply store and had in fact been supplying materials to persons manufacturing illegal alcohol. This case would apply only if claimant were in the business of buying airplanes and then selling them to dope smugglers. Even then it would be apposite only if he had already entered the business and had not merely (as alleged) bought an airplane in contemplation of entering that business.

(e) In *United States v. 600 Bags of Southcoast Turbinado Brand Sugar*, 225 F. Supp. 705 (W.D. La. 1961), the court forfeited sugar in the possession of the claimant on the grounds that it was intended for sale to moonshiners and hence was intended for illegal use. However, the court found that very probably the claimant had already sold a large amount of sugar to moonshiners and was therefore part of an ongoing scheme to manufacture illegal alcohol. *600 Bags* would be like the instant case only if claimant's truck had been forfeited because he subjectively intended at some time in the future to go and get some sugar and sell it to moonshiners, or if sugar in the hands of a bona fide merchant were forfeited on the grounds that claimant intended to buy it and then sell it to moonshiners.

Statutes must if possible be interpreted in a way so as to avoid absurd results, but if the statute is interpreted as the court below would have it, then absurd results follow. In *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973), forfeiture was denied when A drove B to the Minneapolis-St. Paul airport to go to Mexico to buy heroin. Wrote the court: "Neither in distance, time, nor circumstance was this car involved

'in any manner' in the transportation, sale, receipt, or possession, or concealment to such a degree that the law should attach significance to the act." (*Id.* at 280). It would be absurd to deny forfeiture in a *Buick Riviera* type situation and then to effect a forfeit when the only connection between the *res* and any possibly impending criminal conduct is in intention, i.e., in subjective consciousness. The statute itself provides that if a vehicle is unlawfully in the possession of the lawbreaker, then it is not subject to forfeiture, 21 U.S.C. § 881(a)(4)(B), and the Supreme Court has held that such a forfeiture would raise constitutional problems. See *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 685 (1974), *rehearing denied*, 417 U.S. 977 (1974). It is paradoxical that a stolen but actually used vehicle is not subject to forfeiture while a vehicle never actually used is subject to forfeiture. But the trial court's interpretation of § 881 leads to even more absurd consequences. According to the trial court, if someone intends to use the *res* in violation of the statute, then it is subject to forfeit. This holding follows from the fact that the court does not think that it bases its forfeiture decision on the fact that there was intent on the part of someone that the *res* would be used illegally. Thus, an actually used but stolen vehicle may not be forfeited, but if *A* intended to use the vehicle of *B* for a prohibited purpose, then the vehicle would be forfeit, even if it were never used for that purpose. This point would be true even if *A* intended also to steal the vehicle in order to carry out his purpose, for the statute only exempts actually used but stolen vehicles; it does not exempt vehicles which are forfeit solely because they are intended for a prohibited use (where that actual intent will be carried out by the stealing of

the vehicle). Thus, if the vehicle *is* stolen and used, then it is exempt from forfeiture, but if someone merely *thinks about* stealing it and using it in a prohibited manner, then it is subject to forfeiture. This is obviously an absurd result. The Supreme Court has said that forfeitures might raise another constitutional issue: [where] an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that could be expected to prevent the proscribed use of his property. *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690-91 (1974), *rehearing denied*, 417 U.S. 977 (1974). Thus the Supreme Court suggests that if an innocent owner does everything he could do to prevent the prohibited use of his vehicle, then if the vehicle is used in the proscribed way, it would be unconstitutional to penalize the owner of the vehicle through forfeiture. In fact, Intervenor qualified under this Restricted Innocent Owner Exception because that exception makes it clear that actual criminal conduct is a precondition on the applicability of § 881. (See Section A *supra*). However, we are not trying to invoke this very restricted exception here. Rather, we are arguing that it is absurd as a matter of statutory construction to apply the statute to a vehicle which is never in any way actually used in criminal conduct when the Court has carved out an exception to the applicability of the statute, which exception covers certain innocent owners of actually used vehicles.

Thus, the courts (including the Supreme Court) have not interpreted § 881 as authorizing the forfeit of vehicles which are merely intended for prohibited use, and that interpretation would lead to absurd consequences as a matter of statutory interpretation. Finally, the statute need not be read in the way the Complainant and Trial

Court have read it. The "intended for use" clause was never meant to stand on its own. Although the legislative history does not speak to this point directly, U.S. Code, Cong. & Ad. News, 4653-54 (1970), it is clear that the Congress was seriously concerned with trafficking in narcotics. 21 U.S.C. § 801(3) (1976). It is also clear that it intended to enact a statute which would facilitate the regulation and elimination of illegal drug commerce. Thus, they did not want to insist that law enforcement agents catch the vehicles in the very act of breaking the relevant statute. Evidently, they wanted to permit forfeitures where the government could prove that the human person involved had violated the drug laws and where the totality of facts and circumstances indicated that the vehicle to be forfeit was involved in the prohibited activity. See *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976). Also, evidently the Congress wished to permit forfeiture of vehicles which had been used illegally in the past and which were going to be used similarly in the future. See *United States v. $1,963 in U.S. Money*, 270 F. Supp. 396 (E.D. Tenn. 1967) for such an application in the context of anti-gambling statutes. Thus, there is no need to interpret the statute as the Trial Court below does, for there is another plausible, natural reading—a reading which comports with the language of the Supreme Court, its stated constitutional standards, and which does not lead to absurd results.

CONCLUSION

For the above stated reasons Petitioner-Intervenor respectfully urges the Supreme Court issue its writ of certiorari to the Eighth Circuit Court of Appeals to review the issues presented in this cause.

Respectfully submitted,

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APPENDIX

(Filed December 11, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 78-0050-CV-W-1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE 1945 DOUGLAS (C-54-DC-4)
Defendant.

MEMORANDUM AND ORDER

This is a civil forfeiture action filed by the government under 21 U.S.C. §§ 841(a)(1) and 881(a)(4) (1976). Jurisdiction is based upon 28 U.S.C. §§ 1345 and 1355.

The case is before the Court for final judgment on cross-motions for judgment on the pleadings filed by intervenor and the government. Because the parties have stipulated that we may rule the case on the basis of the stipulations, affidavits, and depositions filed in this case, and it is stipulated that no party wishes to adduce any additional evidence in support of its position, we will treat

the cross-motions for judgment on the pleadings as motions for summary judgment. For reasons we shall state, the government's motion for summary judgment will be granted and intervenor's motion will be denied.

The complaint in this case was filed on January 20, 1978. On February 9, 1978, J. Michael Stumpff, identifying himself as "intervener" [sic], filed a claim and answer to complaint for forfeiture. Besides various discovery filings, on May 15, 1978, Stumpff, identifying himself as the defendant in this case, moved for an extension of time in which to file a motion to suppress. On June 9, 1978, treating Stumpff's original filing as a motion for leave to intervene, we granted intervention.

On July 12, 1978, intervenor moved for judgment on the pleadings and to suppress evidence. On July 21, 1978, the parties filed Standard Pretrial Order No. 2, stipulating nearly all of the facts necessary to decide this case. On July 24, 1978, the government filed suggestions in opposition to intervenor's motions and filed the government's cross-motion for judgment on the pleadings. On December 6, 1978, the parties stipulated that "the depositions of Albert and Janice Kammerer previously filed in this cause . . . are admitted into evidence and may be considered by the court in reaching its decision on this matter."[1] In addition, the parties stipulated that "neither side desires to elicit any additional testimony or exhibits above those previously filed herein and expressly waives its right to any further hearing or trial opportunity."

The government seeks to forfeit defendant aircraft under 21 U.S.C. § 881(a)(4):

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1. These depositions were never filed in this Court. In order to make the record complete, we will order the Clerk to file the copies of these depositions which were supplied to the Court on December 1, 1978.

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (4) all conveyances, including aircraft, . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances possessed or distributed in violation of this subchapter].

The government argues that it has demonstrated that the aircraft to be seized was intended to be used to transport marijuana and therefore should be forfeited. In addition, the government argues that intervenor has no standing to intervene in this case because, although he is the record owner of the aircraft, he is not its true owner. Intervenor argues that 21 U.S.C. § 881(a)(4) "cannot be construed as supporting forfeiture" and if so construed, would be unconstitutional as applied.

We find and conclude that the intended use of this aircraft was to transport marijuana illegally. Intervenor has filed an affidavit which states that he is the owner of the aircraft. However, the government's evidence shows, and we find, that Albert Kammerer put up the money for the plane and agreed to put the plane in intervenor's name. The depositions of Albert and Janice Kammerer confirm this. Moreover, the wiretap evidence and the Kammerer depositions clearly show that the aircraft to be forfeited was intended to be used to transport marijuana illegally.

We also conclude as a holding of law that forfeiture is proper under 21 U.S.C. § 881(a)(4), and specifically reject intervenor's argument that the statute does not cover

this situation. We have reviewed the cases cited by intervenor and find them either unpersuasive or inapplicable.

The only case which tends to support intervenor's position that a vehicle must actually have been used in the commission of a crime before it can be forfeited is *United States v. One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974). We do not believe that that case properly construed the statute whose clear language we are bound to apply if constitutional.

The Court of Appeals for the Second Circuit rejected the same argument in *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977); the court stressed the expansive language of § 881(a)(4) in reversing a district court which had relied on *One 1972 Datsun* to deny forfeiture. We agree with the Court of Appeals for the Second Circuit that the "employment [of this language] in a statute specifically addressed to the problem of drug abuse patently indicates the congressional intent to broaden the applicability of the forfeiture remedy it provided." *Id.* at 425.

The Supreme Court cases cited by intervenor do not vary the statutory language that vehicles intended to be used in narcotics trafficking can be forfeited. Intervenor quotes the Supreme Court in *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971), for the proposition that forfeiture statutes were intended to penalize only those "who are significantly involved in a criminal enterprise." That language can not provide intervenor any comfort, however, because we have found that defendant aircraft was intended to be used to transport drugs illegally.

Moreover, the other Supreme Court case relied on by intervenor stresses the breadth of such statutes while

upholding their applicability and constitutionality. The Court authorized the forfeiture of a leased yacht which had been used to transport drugs even though the yacht's owner "was neither involved in nor aware of the act of the lessee which resulted in the forfeiture." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 664 (1974). The Court upheld against constitutional attack a statute virtually identical to 21 U.S.C. § 881(a), suggesting approvingly that:

> "[f]orfeiture of conveyances that have been used - *and may be used again* - in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing *further* illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." Id. at 686-87 (emphasis added).

We see nothing in *Calero-Toledo* which would forbid forfeiture in this case. Indeed, the language quoted above seems to confirm the applicability of the statutes in cases like this.

Intervenor also argues that this statute cannot constitutionally be applied to the facts of this case. His due process arguments are refuted by *Calero-Toledo, supra,* and *United States v. Coin & Currency, supra,* and cases cited therein. Intervenor has cited no cases which even suggest the statute is unconstitutional where the vehicle is to be forfeited because it was intended to be used to transport controlled substances in the future. Intervenor's arguments based on *Powell v. Texas,* 392 U.S. 651 (1968), and the First Amendment are unpersuasive. We conclude that the statute is constitutional.

Because we have found that this aircraft was to be used to transport marijuana illegally, that the statute ap-

plies, and that the statute is constitutional, the aircraft will be forfeited. It is unnecessary to decide who "owns" the aircraft because no claimant has made a valid defense to the forfeiture.

Finally, intervenor has moved to suppress any evidence arising from a search of his residence by State officers. Intervenor cites no cases in support of his motion and does not seek to produce any evidence. We find and conclude that the motion should be denied.

Accordingly, and for the reasons stated, it is

ORDERED (1) that the deposition of Albert and Janice Kammerer shall be filed by the Clerk of the Court as part of the record in this case. It is further

ORDERED (2) that the motion to suppress filed by intervenor should be and the same hereby is denied. It is further

ORDERED (3) that intervenor's motion for judgment on the pleadings, construed as a motion for summary judgment, should be and the same hereby is denied. It is further

ORDERED (4) that the government's motion for judgment on the pleadings, construed as a motion for summary judgment, should be and the same hereby is granted. It is further

ORDERED (5) that the 1945 Douglas (C-54-DC-4) aircraft, Serial Number 22186, should be and the same hereby is forfeited to the United States.

/s/ John W. Oliver
Chief Judge

Kansas City, Missouri
December 11, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1057

United States of America,
Appellee,

v.

One 1945 Douglas C-54 (DC-4) Aircraft,
Serial Number 22186.
J. Michael Stumpff,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: May 14, 1979
Filed: August 17, 1979

Before BRIGHT, HENLEY and McMILLIAN, Circuit Judges.

HENLEY, Circuit Judge.

Intervenor J. Michael Stumpff appeals the judgment of the district court[1] ordering that a DC-4 aircraft to which he holds legal title be forfeited to the United States pursuant to 21 U.S.C. § 881(a)(4). Our review of the record indicates that Stumpff may lack standing to chal-

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1. The United States District Court for the Western District of Missouri, The Honorable John W. Oliver, District Judge, presiding.

lenge the forfeiture. Thus, we remand the case to the district court for such proceedings as are necessary to address the questions and considerations raised herein.

This forfeiture action was filed against the subject aircraft as a result of a Drug Enforcement Administration investigation into the illicit drug dealings of one Albert Kammerer in the Kansas City, Missouri area. According to the government, Kammerer and Stumpff jointly searched for an aircraft to facilitate their drug trafficking activities and arranged to have the DC-4 flown to the Kansas City municipal airport where it was stored in a hangar pending the completion of certain repairs. Although Kammerer supplied all of the purchase money for the aircraft, title to it was placed in Stumpff's name. DEA officers first learned of the aircraft from conversations between Kammerer and Stumpff which had been recorded pursuant to a court authorized wiretap of Kammerer's residence telephone. These conversations, as later supplemented by the explanatory depositions of Kammerer and his wife Janice, establish that the two men intended to use the aircraft primarily as a means of transporting large shipments of marijuana into the United States from Mexico.

With the evidence gained from their wiretaps, DEA officers obtained a search warrant and seized several thousand pounds of hashish and marijuana from the Kammerer residence. Kammerer pleaded guilty to criminal charges stemming from his possession of the drugs. The DEA then initiated forfeiture proceedings against the DC-4 aircraft. Stumpff was granted leave to intervene by the district court because of his owner of record status.

The government freely admits that its investigation produced no evidence showing that either Kammerer or Stumpff actually used the aircraft to transport marijuana

or other controlled substances. Nor was it able to link the aircraft to a specific future drug transaction planned by either man. The wiretap conversations and Kammerer depositions establish only that the men intended to use the aircraft to transport drugs. And, in furtherance of that general intended use, they undertook to have the aircraft repaired and to retain a qualified pilot. The repairs to the aircraft had not been completed at the time it was seized by DEA officers, nor had a pilot been employed.

The district court found, however, that this evidence of "intended use" was sufficient to satisfy the forfeiture requirements of 21 U.S.C. § 881(a)(4). That statute provides in pertinent part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, *or are intended for use,* to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances]. (Emphasis added.)

The court rejected Stumpff's arguments that it had misconstrued the statute or that the statute, so construed, was unconstitutional as applied to the aircraft because there was no *actus rea* or overt act linking the aircraft to a specific illegal transaction.[2] Further, the court refused to make a finding as to the ownership of the aircraft, reasoning that neither Kammerer nor Stumpff had a valid

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2. Stumpff stated broad claims under the first, fourth, fifth and eighth amendments to the Constitution.

defense to the forfeiture because they jointly intended to use the aircraft to transport marijuana.

We have carefully reviewed the record, and in particular the transcripts of the wiretap conversations and the Kammerer depositions, and we agree with Stumpff that the district court's decision raises serious questions concerning the proper construction of § 881(a)(4) and the constitutionality of its application to the present situation. *See generally United States v. U. S. Coin and Currency,* 401 U.S. 715 (1971); *United States v. One 1974 Cadillac Eldorado Sedan,* 548 F.2d 421 (2d Cir. 1977); *United States v. One 1972 Datsun,* 378 F. Supp. 1200 (D. N.H. 1974); *United States v. One 1970 Buick Riviera,* 374 F. Supp. 277 (D. Minn. 1973). We do not rule upon these questions, however, since it is doubtful that Stumpff has standing to raise them in opposition to the forfeiture. *See Urban Contractors Alliance of St. Louis v. Bi-State Development Agency,* 531 F.2d 877 (8th Cir. 1976).

It is the owner or owners of the res who have standing to challenge a forfeiture. *United States v. One 1971 Lincoln Continental,* 460 F.2d 273, 274 (8th Cir. 1972); *Gen. Finance Corp. of Fla. South v. United States,* 333 F.2d 681 (5th Cir. 1964). Broadly speaking, ownership may be defined as having a possessory interest in the res, with its attendant characteristics of dominion and control. *United States v. Fifteen Thousand Five Hundred Dollars,* 558 F.2d 1359 (9th Cir. 1977). The possession of bare legal title to the res may be insufficient to establish ownership. *See,* for example, *United States v. One 1971 Porsche Coupe,* 364 F.Supp. 745 (E.D. Pa. 1973), where the court determined that the forfeited vehicle's owner of record was only a "nominal owner" who could not challenge the forfeiture because he had made a gift of

the vehicle to his son, who had "sole possession and exercised dominion and control over it."

The government chose not to oppose Stumpff's petition to intervene because the Federal Aviation Administration certificate of aircraft registration for the DC-4 had been issued in Stumpff's name. But it did call to the district court's attention that Stumpff's standing to challenge the forfeiture was doubtful since, in its view, Kammerer was the aircraft's true owner. We believe the record provides some support for the government's suggestion that Stumpff lacks standing to intervene.

While it is true that Stumpff delivered the purchase money to the seller and listed himself as the purchaser on the bill of sale for the aircraft, the district court found that Kammerer put up all of the purchase money. And Kammerer stated in his deposition that he considered himself the aircraft's owner. When questioned by the government as to why the bill of sale and FAA registration certificate bore Stumpff's name, Kammerer first testified that he "didn't particularly want to own an airplane." Further questioning revealed that he lacked "the financial capability other than holding money" to be listed as the aircraft's owner on public documents.

The mere fact that the certificate of aircraft registration was issued to Stumpff does not determine rights of ownership in the aircraft as between Kammerer and Stumpff. Such certificates are issued for registration purposes only and are not certificates of title.[3] Significant

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3. 49 U.S.C. § 1401 provides in pertinent part:

Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

See also Haynes v. General Elect. Credit Corp., 432 F.Supp. 763 (W.D. Va. 1977), *aff'd*, 582 F.2d 869; *Texas Nat'l Bank of Houston v. Aurderheide*, 235 F.Supp. 599 (E.D. Ark. 1964).

is the fact that on January 1, 1978 Stumpff, at Kammerer's request, tendered a blank bill of sale for the aircraft to Kammerer. Kammerer did not complete the document or register it with FAA so as to openly transfer title to himself, but instead used it as collateral to obtain bond money after his arrest. This transaction seems to indicate that Kammerer, and not Stumpff, exercised dominion and control over the aircraft and thus was its true owner. If this reading of the record proves correct upon further consideration by the district court, and it is established that title to the aircraft was placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer, then Stumpff's intervention should be dismissed.

We do not at this time deem it necessary to vacate the district court's order of forfeiture because of doubt over Stumpff's standing to challenge that order and the fact that Kammerer has chosen not to become a party to these proceedings. The case is remanded to the district court for such proceedings consistent with this opinion as are necessary to address the issue of intervenor's standing and other matters raised herein.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Filed April 18, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 78-0050-CV-W-1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE (1) 1945 DOUGLAS C-54 AIRCRAFT,
Serial No. 22186,
Defendant.

MEMORANDUM AND ORDERS DISMISSING STUMPFF INTERVENTION

I.

The Court of Appeals remanded this case with directions that this Court conduct further proceedings to address the issue of intervenor Stumpff's standing, noting that "our review of the record indicates that Stumpff may lack standing to challenge the forfeiture" (slip opinion, p. 1). The Court of Appeals specifically concluded that if the proceedings on remand established "that title to the aircraft was placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer, then Stumpff's intervention should be dismissed" (slip opinion, p. 7).

Post-remand proceedings were directed by this Court which prompted the parties to file a supplemental stipulation of facts on April 10, 1980. Paragraph 5 of that stipulation provided that the described acts of Stumpff as set forth in the stipulation and the exhibits attached thereto are to be considered with the previously stipulated evidence "in lieu of further evidentiary hearing in this action." That paragraph further provided that "[t]he parties expressly decline to present any further evidence on the issue before the Court after remand from the Eighth Circuit Court of Appeals." The case is therefore in a posture for final decision.

II.

On page 3 of our original memorandum and order, we expressly rejected the conclusion stated in Stumpff's affidavit that he was "the owner of the aircraft." Indeed, we made an express finding that "Kammerer put up the money for the plane and agreed to put the plane in intervenor's name."

The Court of Appeals concluded that "the possession of bare legal title to the *res* may be insufficient to establish ownership" (slip opinion, p. 5). The Court of Appeals took particular note of the established fact that Stumpff, at Kammerer's request, tendered a blank bill of sale for the aircraft to Kammerer on January 1, 1978 and that Kammerer used that document as collateral to obtain bond money after his arrest. The Court of Appeals stated that "this transaction seems to indicate that Kammerer, and not Stumpff, exercised dominion and control over the aircraft and thus was its true owner" (slip opinion, pp. 6-7).

While our view of the legal questions presented did not require that we reach the question of whether Kam-

merer or Stumpff was the true owner of the aircraft, we quite agree with the Court of Appeals' reading of the record and, in accordance with the direction of that Court, we expressly find that title to the aircraft was in fact placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer. In short, we find that Kammerer, and not Stumpff was the true owner of the aircraft and that Stumpff did not have standing to intervene.

III.

The factual circumstances contained in the April 10, 1980 supplemental stipulation of facts do not support a finding that Stumpff has standing to intervene. Indeed, the stipulated circumstances are completely consistent with our finding that Kammerer, the true owner, wished to stay in the background and to utilize Stumpff as a front man to conceal Kammerer's financial affairs and drug activity.

Most, but not all of the exhibits attached to the April 10, 1980 supplemental stipulation of fact were a part of the record considered by the Court of Appeals. Those exhibits, for the most part, were attached to the claim for remission or mitigation of forfeiture filed by Airmen, Inc., on January 27, 1978. Airmen, Inc.'s claim for remission or mitigation of forfeiture was withdrawn the day after this Court entered its order allowing co-custody of the seized aircraft on February 14, 1978. The withdrawal of that claim, however, did not remove those exhibits from the record considered by the Court of Appeals.

The only evidence of any substance which was not available for the Court of Appeals' consideration is that which relates to Stumpff's stipulated testimony in regard

to his purchase of de-icer boots in California for the sum of $4,500.00. While it may be true that Stumpff purchased the de-icer boots with his own money which were "suitable for use" on the airplane, it is further stipulated, however, that the de-icer boots were never actually delivered, that they were never installed on the airplane, and that they were not on the airplane when it was sold. It therefore cannot properly be said that Stumpff has standing to intervene even in regard to the $4,500.00 which we assume he paid for the de-icer boots.

In short, there is simply no substantial evidence in the record that is inconsistent with this Court's original finding and the Court of Appeals' independent finding that "although Kammerer supplied all the purchase money for the aircraft, title to it was placed in Stumpff's name."

Pursuant to the Court of Appeals' direction, this Court finds and concludes that Stumpff's possession of bare legal title was insufficient to establish ownership of the aircraft and that such evidence is also insufficient to establish Stumpff's standing to intervene.

For the reasons stated, and in accordance with the directions of the Court of Appeals, it is therefore

ORDERED (1) that Stumpff's intervention should be and the same is hereby dismissed. It is further

ORDERED (2) that in accordance with the applicable Rule, the Clerk shall enter an appropriate final judgment.

/s/ John W. Oliver
Chief Judge

Kansas City, Missouri
April 18, 1980

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1371

United States of America,
Appellee,

v.

One 1945 Douglas C-54 (DC-4) Aircraft,
Serial Number 22186
J. Michael Stumpff,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 13, 1980
Filed: May 11, 1981

Before LAY, Chief Judge, BENNETT,* Court of Claims Judge, and HENLEY, Circuit Judge.

Appellee, United States of America, instituted forfeiture proceedings, pursuant to 21 U.S.C. § 881(a)(4), against One 1945 Douglas C-54 (DC-4) Aircraft, Serial Number 22186. Appellant, J. Michael Stumpff, was granted leave to intervene and challenge the forfeiture. Based on stipulations, affidavits and documentary evidence, each party moved for summary judgment. The district court, finding the aircraft subject to forfeiture, granted appellee's

*Marion T. Bennett, Judge, United States Court of Claims, sitting by designation.

motion and entered judgment accordingly. *United States v. One 1954 Douglas C-54 (DC-4) Aircraft*, 461 F. Supp. 324 (W.D. Mo. 1978).

Stumpff appealed from that judgment, challenging the constitutionality of 21 U.S.C. § 881(a)(4) as applied. This court, without addressing the constitutional challenge, remanded for the district court to determine whether Stumpff had standing to contest the forfeiture. *United States v. One Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27 (8th Cir. 1979). After receiving additional stipulations and documentary evidence, the district court[1] found that Stumpff was not the true owner of the aircraft. For that reason, it concluded Stumpff lacked standing and entered judgment dismissing his intervention. He now challenges that judgment and we affirm.

The forfeiture which Stumpff contests resulted from a Drug Enforcement Administration (DEA) investigation into suspected illegal drug trafficking of Stumpff and one Albert Kammerer. According to the DEA, Stumpff and Kammerer obtained the forfeited aircraft to facilitate their drug trafficking. Kammerer has not contested the aircraft's forfeiture.[2]

The record before the court on Stumpff's first appeal showed the following:

1. A Federal Aviation Administration registration certificate issued in Stumpff's name and covering the forfeited aircraft.

2. A statement of expenses incurred by Stumpff, but not paid, for maintenance and storage of the aircraft.

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1. The Honorable John W. Oliver, then Chief Judge, Western District of Missouri.

2. For a more detailed discussion of the facts surrounding this case see *United States v. One Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27 (8th Cir. 1979).

3. A receipt given to Stumpff in exchange for a $10,000.00 deposit he made on the aircraft's purchase price.

4. The aircraft's bill of sale listing Stumpff as the purchaser.

5. Wiretapped conversations between Stumpff and Kammerer in which Kammerer agreed to supply the purchase money for the aircraft.

6. Statements by Kammerer's wife indicating that she discussed with Stumpff the possibility of Kammerer purchasing an aircraft.

7. Kammerer's statements that although title to the aircraft was in Stumpff's name, he considered himself the owner.

8. A blank bill of sale, given by Stumpff to Kammerer at his request, and used by Kammerer as collateral to obtain bond money.

Presented with this evidence, the court doubted that Stumpff had standing to contest the forfeiture. *Id.* at 28. In remanding, the court said that if

> it is established that title to the aircraft was placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer, then Stumpff's intervention should be dismissed.

Id. at 29.

On remand, the district court was presented the following new evidence and stipulations:

1. Receipts showing that Stumpff purchased deicer boots for the aircraft. This equipment was never delivered and was not with the aircraft when it was seized.

2. Receipts showing that Stumpff paid $50.00 for two months storage of the aircraft and $375.00 for certain other storage and maintenance.

3. Receipts showing that Stumpff, through his brother, rented equipment to use in repairing the aircraft.

4. Stumpff failed to pay monthly maintenance charges on the aircraft in accordance with an agreement between himself and the government.

The district court, after reviewing the evidence before it, concluded that Stumpff lacked standing to contest the forfeiture. It said,

> [W]e expressly find that title to the aircraft was in fact placed in Stumpff's name merely as a subterfuge to conceal the financial affairs and drug dealings of Kammerer. In short, we find that Kammerer, and not Stumpff, was the true owner of the aircraft and that Stumpff did not have standing to intervene.

United States v. One 1954 Douglas C-54 (DC-4) Aircraft, No. 78-0050-CV-W-1, mem. op. at 2 (W.D. Mo. April 18, 1980). We find this conclusion supported by the evidence and not clearly erroneous.

To contest a forfeiture, one must have an ownership interest in the res. *United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) United States Currency*, 558 F.2d 1359, 1361 (9th Cir. 1977); *General Finance Corp. v. United States*, 333 F.2d 681, 682 (5th Cir. 1964); *see United States v. Eleven Thousand Five Hundred and Eighty Dollars ($11,580) In United States Currency*, 454 F.Supp. 376, 381 (M.D. Fla. 1978). An ownership interest, of course may be evidenced in a number of ways including showings of actual possession, control, title and financial stake.

On Stumpff's first appeal, the court, in examining his interest in the res, said the following:

> While it is true that Stumpff delivered the purchase money to the seller and listed himself as the purchaser on the bill of sale for the aircraft, the district court found that Kammerer put up all of the purchase money. And Kammerer stated in his deposition that he considered himself the aircraft's owner. When questioned by the government as to why the bill of sale and FFA registration certificate bore Stumpff's name, Kammerer first testified that he 'didn't particularly want to own an airplane.' Further questioning revealed that he lacked 'the financial capability other than holding money to be listed as the aircraft's owner on public documents.
>
> The mere fact that the certificate of aircraft registration was issued to Stumpff does not determine rights of ownership in the aircraft as between Kammerer and Stumpff. Such certificates are issued for registration purposes only and are not certificates of title. Significant is the fact that on January 1, 1978 Stumpff, at Kammerer's request tendered a blank bill of sale for the aircraft to Kammerer. Kammerer did not complete the document or register it with the FAA so as to openly transfer title to himself, but instead used it as collateral to obtain bond money after his arrest. This transaction seems to indicate that Kammerer, and not Stumpff, exercised dominion and control over the aircraft and thus was its true owner.

604 F.2d at 29 (footnote omitted).

The evidence subsequently presented to the district court is consistent with Kammerer's dominion and control. As the district court pointed out, that evidence, like the

purchase of the aircraft, suggests that Stumpff was Kammerer's front-man. That was the precise reason title to the aircraft was placed in Stumpff's name.[3] Kammerer controlled the aircraft, as evidenced by his using it for collateral, and he paid for it.

We agree with the district court that Stumpff was not the true owner of the aircraft. Accordingly, we affirm the district court's judgment dismissing Stumpff's intervention.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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3. In other circumstances, it is possible that a bill of sale and registration certificate might be sufficient to establish an ownership interest. *United States v. One (1) Douglas A-26B Aircraft*, 436 F.Supp. 1292, 1295-96 (S.D. Ga. 1977).

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

Telephone Number
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June 8, 1981

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1104 Oak Street
Kansas City, MO 64106

Hon. Ronald S. Reed
U. S. Attorney
Attn: Kenneth Josephson
549 U. S. Cthse.
811 Grand Ave.
Kansas City, MO 64106

Re: No. 80-1371. U. S. v. J. Michael Stumpff.

Dear Sirs:

Enclosed to each of you is copy of order entered today in the above case at the direction of the Court.

Sincerely,

/s/ Robert D. St. Vrain
per eh
Robert D. St. Vrain
Clerk of Court

eh
enc.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Re: No. 80-1371
September Term, 1980

United States of America,
Appellee,

vs.

J. Michael Stumpff,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 8, 1981

Opposition

Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-516

In the Supreme Court of the United States

OCTOBER TERM, 1981

J. MICHAEL STUMPFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Jerome v. *United States*, 318 U.S. 101 3

United States v. *Currency Totalling $48,318.08*, 609 F. 2d 210 3

United States v. *Eleven Thousand Five Hundred and Eighty Dollars ($11,580) in U.S. Currency*, 454 F. Supp. 376 3

United States v. *Fifteen Thousand Five Hundred Dollars*, 558 F. 2d 1359 3

United States v. *One Ford Truck*, 46 F. 2d 176 5

United States v. *One 1971 Lincoln Continental*, 460 F. 2d 273 3

United States v. *600 Bags of Southcoast Turbinado Sugar*, 225 F. Supp. 705 5

United States v. *$364,960 in U.S. Currency*, No. 80-5207 (5th Cir. Nov. 13, 1981) 5

United States v. *$22,640 in United States Currency*, 615 F. 2d 356 3

Statute:

21 U.S.C. 881(a)(4) 1, 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-516

J. MICHAEL STUMPFF, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in concluding that he lacked standing to challenge the government's claim of forfeiture, and further that the forfeiture of an aircraft intended for use in smuggling controlled substances, but not yet used for such purpose, is contrary to law.

1. On January 20, 1978, the government filed a complaint in the United States District Court for the Western District of Missouri seeking forfeiture of a DC-4 aircraft pursuant to 21 U.S.C. 881(a)(4). Petitioner was granted leave to intervene by the district court because he was the record owner of the aircraft. The forfeiture action arose out of a DEA investigation into the narcotics activity of Albert Kammerer in the Kansas City area. DEA agents learned of the aircraft from wiretapped conversations between Kammerer and petitioner. The court below found that these

conversations, considered in conjunction with the depositions of Kammerer and his wife, "establish that the two men intended to use the aircraft primarily as a means of transporting large shipments of marijuana into the United States from Mexico" (Pet. App. A8). Although Kammerer supplied all the purchase money for the aircraft, title to it was placed in petitioner's name "as a subterfuge to conceal the financial affairs and drug dealings of Kammerer" (Pet. App. A15).

With the evidence gained from the wiretaps, DEA agents obtained a search warrant and seized 19,000 pounds of hashish, 11 pounds of marijuana and $42,049 in currency from Kammerer's residence (Standard Pretrial Order No. 2, para. 40). Kammerer pleaded guilty to drug possession charges and did not contest the forfeiture of the aircraft (Pet. App. A8).

The forfeiture evidence, which is not in dispute, also showed that, in furtherance of their scheme to use the aircraft to transport drugs, the two men undertook to have the aircraft repaired and to retain a qualified pilot. The aircraft was seized before it could be used for its intended purpose (Pet. App. A9). The district court found that the aircraft was subject to forfeiture.

Following a remand by the court of appeals to address the issue of petitioner's standing to challenge the forfeiture, the district court found that title to the aircraft was placed in petitioner's name as a subterfuge and that Kammerer was the true owner of the aircraft. The court concluded that petitioner lacked standing to claim the aircraft, and it therefore dismissed him as an intervenor (Pet. App. A15-A16). The court of appeals affirmed on that basis without reaching the issue whether the aircraft was properly subject to forfeiture (Pet. App. A17-A22).

2. Petitioner contends that the courts below erred in concluding that he lacked standing to oppose the forfeiture action. Stripped of its technical jargon, however, petitioner's argument boils down to a disagreement with the factual finding of both courts that the aircraft was owned by Kammerer.[1] That finding is amply supported by the record, and there is no reason for this Court to review it.[2] Kammerer stated in his deposition that he was the aircraft's true owner (Pet. App. A11), and other evidence in the record supports his assertion. Aside from putting up all the money for its purchase, Kammerer gave the bill of sale for the aircraft (with the purchaser's identity left blank) to a bail bondsman as collateral (Pet. App. A14). This indicates that Kammerer exercised dominion and control over the aircraft and that

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[1]Petitioner does not challenge the settled legal principle that it is only the owner of the res who has standing to challenge a forfeiture. *United States* v. *Fifteen Thousand Five Hundred Dollars*, 558 F. 2d 1359, 1361 (9th Cir. 1977); *United States* v. *One 1971 Lincoln Continental*, 460 F. 2d 273, 274 (8th Cir. 1972).

[2]Petitioner asserts that he would be deemed the owner of the aircraft under Missouri law, and that this requires that he be accorded standing to claim it in the federal forfeiture porceeding. However, the cases relied on by petitioner (Pet. 5-7) do not support the conclusion that he would be considered the aircraft's owner under state law on the facts found by the district court. In any event, whatever may be the specifics of state property law, federal courts, including the court of appeals here, consistently and properly look to federal law to determine the nature and existence of an interest sufficient to afford a claimant standing to contest a federal forfeiture action (Pet. App. A20-A22); *United States* v. *Currency Totalling $48,318.08*, 609 F. 2d 210, 213-214 (5th Cir. 1980); *United States* v. *$22,640 in United States Currency*, 615 F. 2d 356, 360 (5th Cir. 1980); *United States* v. *Eleven Thousand Five Hundred and Eighty Dollars ($11,580) in U.S. Currency*, 454 F. Supp. 376, 381-382 (M.D. Fla. 1978). See generally *Jerome* v. *United States*, 318 U.S. 101 (1943). Finally, here as in most such cases, it makes little difference to the disposition of the case whether state or federal law is applied to identify the nature and extent of a claimant's property interest in the res.

petitioner was a mere strawman. As the court of appeals observed, the "mere fact that the certificate of aircraft registration was issued to [petitioner] does not determine rights of ownership in the aircraft as between Kammerer and [petitioner]" (Pet. App. A11).

3. Even assuming, for the sake of argument, that petitioner has standing to contest the forfeiture, his argument on the merits is without substance. The language of 21 U.S.C. 881(a)(4) plainly allows the forfeiture of the aircraft,[3] and the statute has no constitutional infirmity. Petitioner argues that because civil forfeitures are quasi-criminal in nature, some person must perform an actus reus, or voluntary act, in conjunction with the vehicle to make it subject to forfeiture. Petitioner contends (Pet. 9) that in this case the government has forfeited a vehicle "solely because of what someone subjectively thought about doing with it" and that, therefore, the fundamental requirement of an actus reus is lacking.

Of course, merely thinking about using a vehicle for illegal purposes would not subject the vehicle to forfeiture. The evidence here clearly showed, however, that petitioner and Kammerer had entered into a conspiracy to import marijuana into the United States and had performed overt acts to prepare the aircraft to be used as the means of bringing the conspiracy to fruition (Pet. App. A3). Such activities satisfy any actus reus requirement. Petitioner does

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[3] 21 U.S.C. 881(a) provides, in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances].

not contend, nor could he, that the authorities were required by the Constitution to wait until the marijuana was inside the aircraft before seizing it for forfeiture.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

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[4]See *United States* v. *$364,960 in U.S. Currency*, No. 80-5207 (5th Cir. Nov, 13, 1981), slip op. 12,979; cf. *United States* v. *600 Bags of Southcoast Turbinado Sugar*, 225 F. Supp. 705, 708 (W.D. La. 1964); *United States* v. *One Ford Truck*, 46 F. 2d 176 (S.D. Tex. 1931).

DOJ-1981-12